In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 528

NORRIS EDWARD BASS, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court dismissing an action brought by appellant to set aside an Interstate Commerce Commission order which denied his application for a permit to engage in interstate commerce as a contract carrier of passengers by motor vehicle. In the district court, appellant conceded that the Commission's find-

ings of fact are supported by substantial evidence (J. St. 18, 21).

Appellant has been engaged for several years in the business of transporting children to and from schools in Campbell County, Virginia (J. St. 23). He has also provided occasional charter bus service to out-of-state points for Boy Scout, church and children's groups (*id.*, 23–24). He applied to the Commission for a permit authorizing him to operate as a contract carrier of passengers in charter service between points in Virginia and all points in the United States, and also urged that he did not require Commission authorization in order to continue his prior interstate operations (*id.* 22–23). The Commission rejected the latter contention, and denied the contract-carrier application (*id.* 25–26). It ruled that appellant's proposed service "is not essentially different from that offered and afforded by the opposing motor common carriers" (*id.* 25), and that since appellant had not established that his proposed service met any need which existing carriers could not satisfy, he had failed to make the showing required by Section 209 (b) of the Act, *i. e.*, that the proposed operations "will be consistent with the public interest and the national transportation policy declared in this Act" (*id.* 26, 30).

The district court, in a *per curiam* opinion, unanimously upheld the validity of the Commission's order. It held that appellant's interstate operations were not within exemption (9) of Section 203 (b) of the Act (J. St. 20–21). It further held that the Commission's factual findings warranted and required re-

jection of the contract-carrier permit sought by appellant (*id.* 21). It observed: "Even if we should disagree with the Commission's judgment in resolving the conflicting competitive considerations, we are not authorized to substitute our own views" (*ibid.*).

ARGUMENT

1. Appellant contends that it was improper to reject his application upon the ground that existing common carriers offer essentially the same service as that which he proposes. He contends that since the statute makes provision for both common-carrier and contract-carrier passenger motor service, it recognizes that the two types of service are different, and that the public is entitled to have both types available. However, appellant is relying on a distinction without a difference insofar as chartered bus service is concerned. Section 208 (c) of the Act, 49 U. S. C. 308 (c), provides that any common carrier transporting passengers under a certificate issued by the Commission may transport in interstate commerce to any place "special or chartered parties" under such rules and regulations as the Commission shall have prescribed.[1] In the present case, the Commission merely determined that since several carriers could and did provide adequate chartered bus service, allowing appellant to duplicate this service would not be consistent with the public interest.

[1] The Commission's regulations define the quoted words as meaning "a group of persons who, pursuant to a common purpose and under a single contract, * * * have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary * * *." *Regulations, Special or Chartered Party Service*, 29 M. C. C. 25, 47–48.

Congress might have excluded all charter service from the authority which is conferred by grant of a certificate to render passenger service as a common carrier by motor. It chose, instead, to include within this grant authority to furnish chartered bus service. This is a legislative determination that common carriers are entitled to render this type of service, and to receive the revenue accruing therefrom, and the Commission and the courts must respect the Congressional decision to put chartered bus operations within the common carrier field.

The decision below is not in any respect in conflict with *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83. That case held that the Commission did not give proper effect to the National Transportation Policy declared by Congress when it rejected an application for authority to provide common carrier motor service for shippers presently having only rail service available, without passing upon the question of the possible advantages inherent in the different mode of transportation for which a certificate was sought. Since the present appellant did not propose to furnish a mode of transportation different from that already available, the Commission had no occasion to appraise or weigh the advantages inherent in one mode of transportation as compared with another. In short, the instant case does not involve or present the issue decided in *Schaffer*. And the same mode of transportation is not converted into a differing mode, within the meaning of the statute's National Transportation Policy declaration, because existing carriers derive their authority to furnish this transportation from

common-carrier certificates issued under Section 206 of the Act whereas appellant sought authority to furnish the same mode of transportation by virtue of grant of a contract-carrier permit issued under Section 209 of the Act.

2. We submit that the Commission and the court below were clearly correct in rejecting appellant's contention that his interstate operations fall within exemption (9) of Section 203 (b), which excludes from Part II of the Act (except certain provisions of Section 204) "the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business." Exemption (1) of Section 203 (b), covering "motor vehicles employed solely in transporting school chi. ren and teachers to or from school", is not applicable here because appellant's motor vehicles are not so employed in its interstate operations.

The court below said that it is "clear beyond question" that appellant, who has been engaged for several years in transporting school children to and from schools in a certain Virginia county, is engaged in transportation by motor vehicle as a regular occupation or business (J. St. 20). The fact that this transportation is intrastate does not mean that appellant is not engaging in motor transportation as a regular business. The court below considered this conclusion free from doubt, but said that, even if it were doubtful, "it would be set at rest by the consistent administrative rulings of the Commission during the past twenty years

that a person engaged in transporting in *intrastate* commerce by motor vehicle as a regular occupation is not exempt from regulation if he undertakes also even casual or occasional transportation of passengers in interstate commerce" (J. St. 20–21).[2] Thus, as the court observed, appellant is outside the claimed exemption both on the basis of the clear meaning of its language and on the basis of consistent administrative construction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal presents no substantial question and that the judgment of the district court should be affirmed.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

CHARLES H. WESTON,
W. LOUISE FLORENCOURT,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
CARROLL T. PRINCE, JR.,
Attorney,
Interstate Commerce Commission.

DECEMBER 1958.

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[2] As to the rulings to which the court below referred, see Interstate Commerce Commission Ruling No. 49, April 15, 1937; Interstate Commerce Commission Ruling No. 80, May 23, 1939; *Webster Common Carrier Application*, 72 M. C. C. 708 (1957). Appellant has not cited any contrary Commission ruling, either in the district court (J. St. 21) or in this Court.

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Appellant

v.

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ATLANTIC GREYHOUND CORPORATION
CAROLINA COACH COMPANY, INC.
EASTERN GREYHOUND LINES
RICHMOND GREYHOUND LINES, INC.
VIRGINIA STAGE LINES, INC.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

MOTION TO AFFIRM

LINWOOD C. MAJOR, JR.
JAMES F. NEAL
AND
WILLIAM C. BATTLE
Counsel for Motor Carrier Appellees

Of Counsel
TURNEY & TURNEY
2001 Massachusetts Ave., N. W.
Washington 6, D. C.

PERKINS, BATTLE & MINOR
Court Square Building
Charlottesville, Virginia

TABLE OF CONTENTS

	Page
INDEX	i
STATEMENT	1
ARGUMENT	2
No Substantial Question Presented	2
CONCLUSION	10
CERTIFICATE OF SERVICE	10

CITATIONS

Cases:

Addison v. *Holly Hill Fruit Products*, 322 U.S. 607 (1943)	8
Contracts of Contract Carriers, 1 M.C.C. 628, 629 (1937)	5
Cox Contract Carrier Application, 14 M.C.C. 77 (1939)	5
Crane v. *Commissioner of Internal Revenue*, 331 U.S. 1 (1946)	8
Guex Extension — Chicago Commercial Zone, 67 M.C.C. 224, 225 (1956)	5
Huss, Inc., Extension — Lumber, 64 M.C.C. 439 (1955)	5
Illing Contract Carrier Application, 52 M.C.C. 79 (1950)	5, 6
Aaron W. Johnson, Common Carrier Application, 54 M.C.C. 822 (1952)	9
Karzen Contract Carrier Application, 31 M.C.C. 613 (1942)	5
Keystone Transportation Co. Contract Carrier Application, 19 M.C.C. 475 (1939)	5
Kilmer Transp. Co. Extension — Uniontown, 53 M.C.C. 561 (1951)	5
Martin v. *United States*, 100 F 2d 490, 494 (1939)	8
Motor Carrier Regulations — Exemptions, 10 M.C.C. 533 (1938)	9
Parry Extension of Operations — Property, 44 M.C.C. 351 (1945)	5
Regulations Special or Charter Party Service, 29 M.C.C. 25, 47 (1941)	4
Root v. *Topeka Ry.*, 96 Kan. 694, 153 Pac. 550 (1915)	8
Sauers Extension — East Cambridge, Mass., 61 M.C.C. 65 (1952)	5

Page

Schaffer Transportation Co. v. *United States*, 355 U.S. 83 (1957) 3, 4
Shoemaker Contract Carrier Application, 53 M.C.C. 246 (1951) 5
Tom Still Transfer Co., 27 M.C.C. 42, 44 (1940) 5
Texas & N.O.R. Co. v. *Owens*, 54 S.W. 2d 848, 853 (Tex. 1932) 8
United States v. *Chicago, N.S.&M.R. Co.*, 288 U.S. 1 (1932) 9
United States v. *Contract Steel Carriers*, 350 U.S. 409 (1956) 6
Walter C. Benson Co., Inc., Extension — N.Y., N.J., and Pa., 61 M.C.C. 128 (1952) 5
Webster Common Carrier Application, 72 M.C.C. 708 (1957) 9
Wilson v. *United States*, 114 F Supp. 814 (1953) 5

Statutes:

28 U.S.C. 2284 1
28 U.S.C. 2325
49 U.S.C. 309(b) 2, 3, 6
49 U.S.C. 303(b)(9) 2, 7, 8
49 U.S.C. 303(a)(15) 3, 6
49 U.S.C. 307 8
71 Stat. 412 6
49 U.S.C. 303(a)(19) 9

Miscellaneous:

U. S. Code Cong. & Adm. News 1599, 85th Cong. 1st Sess. 1957 4
Senate Report No. 703 6
Black's Law Dictionary p. 274 (4th Ed. 1951) 8
Webster's New Collegiate Dictionary (2d Ed. 1951) 3
79 Cong. Rec. 5651 9
I.C.C. Administrative Ruling No. 49 9

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MOTION TO AFFIRM

Appellees, Atlantic Greyhound Corporation, Carolina Coach Company, Inc., Eastern Greyhound Lines, Richmond Greyhound Lines, Inc., and Virginia Stage Lines, Inc., move the Court to affirm the judgment sought to be reviewed on appeal upon the ground that the questions presented are so unsubstantial as not to need further argument. (Rule 16, 1(c))

STATEMENT

This is a direct appeal from a final judgment entered on July 11, 1958, by a three-judge district court convened under 28 U.S.C. 2284 and 2325, dismissing appellant's request to

set aside an order of the Interstate Commerce Commission. The decision of the Commission is set forth in Appendix B to the jurisdictional statement of the appellant.

On June 26, 1957, the Interstate Commerce Commission issued a report and order denying appellant's application, under section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b)), for authority to operate as a contract carrier by motor vehicle of passengers, in charter service, between points in Virginia and all points in the United States. Denial of the application was predicated primarily upon the grounds that: (1) applicant failed to prove that any need for the proposed service cannot be provided by existing common carriers; (2) applicant's proposed charter bus service is not essentially different from that offered and afforded by the opposing motor common carriers; and (3) applicant had failed to establish that its proposed service would be consistent with the public interest and the national transportation policy.

In that same report and order, the Commission also found that applicant, who is presently engaged in the business of transporting children to and from schools in Campbell County, Virginia, does not qualify for the exemption provided for in section 203(b)(9) of the Act (49 U.S.C. 303(b)(9)) relating to the casual or occasional transportation of property or passengers in interstate commerce by a person not engaged in transportation as an occupation or business.

The Court below unanimously sustained the findings and order of the Interstate Commerce Commission.

ARGUMENT

I.

No Substantial Question Presented

Although appellant contends that there are 15 questions presented by its appeal, basically there are but two issues to be determined by the Court as the several questions posed

by appellant quite obviously duplicate or overlap each other.

The first issue raised by appellant is whether the Commission may properly consider the adequacy of service offered by existing common carriers in determining if a service proposed by an applicant for a contract-carrier permit is consistent with the public interset and the national transportation policy.

Section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)), prior to the 1957 amendment, defined a contract carrier, *inter alia*, as any person who, under individual contracts, engages in transportation for hire in interstate or foreign commerce other than as a common carrier. By Section 209(b) of the same Act (49 U.S.C. 309(b)), Congress authorized the Commission, upon application, to issue a permit if the operations proposed "will be consistent with the public interest and the national transpor ion policy . . . ."

Applicant does not contend that the adequacy of existing service is not a proper factor to be considered in determining the consistency with the public interest of the proposed service, nor does he except to the findings of the Commission: (1) that the proposed charter service from points in Virginia to all points in the United States is essentially identical to that presently offered by existing common carriers; and (2) that, as a matter of fact, the present service is adequate. It is appellant's contention, however, that, as a matter of law, the Commission cannot consider the adequacy of the service offered by common carriers in disposing of an application for a contract carrier permit. In support of this proposition, appellant relies upon some alleged, but unidentified, inherent differences between common and contract carriage, and upon this Court's decision in *Schaffer Transportation Company* v. *United States*, 355 U.S. 83 (1957). Neither supports appellant's not-too-novel theory.

Contrary to there being any inherent difference in common and contract carriage as such, one of the most frequently voiced criticisms of the Motor Carrier Act (Part II of the

Interstate Commerce Act) as originally enacted, was the failure of Congress to draw a clear line of demarcation between the two.[1] See testimony of Commission Chairman Owen Clarke before the Senate Subcommittee on Surface Transportation, U.S. Code Cong. & Adm. News 1599, 85th Congress, 1st Session, 1957. Furthermore, the rationale of the *Schaffer* case, instead of supporting appellant, actually points the other way. The precise holding of that case is that the Commission must not summarily deny an application for motor-carrier authority just because a different mode of transportation, *i.e.*, rail, can handle the traffic. This Court was careful to point out that the Commission must compare the particular service proposed, and its advantages, with the service presently available from *any* mode of transportation. In this respect, the Court stated:

> "Of course adequacy of rail service is a relevant consideration but . . . 'relative or comparative adequacy' of the existing service is the significant consideration . . . ."

Obviously, this Court was not sanctioning unwarranted duplication of service such as appellant proposes.

Thus, under the reasoning of the *Schaffer* case, and assuming arguendo that contract and common carriers offer different modes of transportation, the Commission certainly would have committed error in granting appellant a permit for contract carriage without considering the adequacy of existing common-carrier service.

In the instant case, the Commission considered the present and proposed service, and found that the service proposed by appellant is identical with that presently available from and offered by protesting common carriers. In such a situation,

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[1] This is particularly true in charter bus service, as the nature of such service renders it the equivalent of contract carrier service. See *Rule 2 of Regulations, Special or Chartered Party Service*, 29 M.C.C. 25, 47 (1941).

the Commission has consistently denied applications for contract-carrier permits and has concluded that:

> " . . . we would be remiss in our duty under the national transportation policy of fostering 'sound economic conditions in transportation . . .' if we authorized operation by a contract carrier on such tenuous bases as here involved, where it definitely would result in diversion of traffic from existing common carriers through no fault of their own or any inadequacy in their service." *Guex Extension — Chicago Commercial Zone*, 67 M.C.C. 224, 225 (1956).

To the same effect see *Wilson* v. *United States*, 114 F. Supp. 814 (1953); *Huss, Inc., Extension — Lumber*, 64 M.C.C. 439 (1955); *Sauers Extension—East Cambridge, Mass.*, 61 M.C.C. 65 (1952); *Walter C. Benson Co., Inc., Extension—N.Y., N.J., and Pa.*, 61 M.C.C. 128 (1952); *Shoemaker Contract Carrier Application*, 53 M.C.C. 246 (1952); *Kilmer Transp. Co. Extension—Uniontown*, 53 M.C.C. 561 (1951); *Karzen Contract Carrier Application*, 31 M.C.C. 613 (1942); *Tom Still Transfer Co.*, 27 M.C.C. 42, 44 (1940); and *Cox Contract Carrier Application*, 14 M.C.C. 777 (1939).

From the beginning of motor carrier regulation, the Commission has considered that the reason for the regulation of contract carriers was for the protection and maintenance of adequate and efficient common-carrier service, *Contracts of Contract Carriers*, 1 M.C.C. 628, 629 (1937); *Keystone Transportation Co. Contract Carrier Application*, 19 M.C.C. 475 (1939), and, consistent with this view of the purpose of the regulation, has issued contract-carrier permits only where the proposed operations offered service of a specialized nature tailored to fit the needs of individuals, which service was not presently available. *Illing Contract Carrier Application*, 52 M.C.C. 79 (1950); *Walter C. Benson Co., Inc., Extension — N.Y., N. J., and Pa., supra; Parry Extension of Operations — Property*, 44 M.C.C. 351 (1945). Contrary to the assertions of appellant, this practice has been followed regardless of

whether the proposed service involved the carriage of property or passengers. See *e.g., Illing Contract Carrier Application, supra.*

This long-established interpretation by the Commission of its duty and authority was recognized and not disturbed by this Court in *United States* v. *Contract Steel Carriers*, 350 U. S. 409 (1956), and, as hereinafter indicated, has been confirmed by Congress in the 1957 amendment to the Interstate Commerce Act.

In August, 1957, Congress, by Public Law 85-164, 71 Stat. 412, amended section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)) to define a contract carrier as:

> " . . . any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce . . . under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct needs of each individual customer."

At the same time, Congress amended section 209(b) of the Act (49 U.S.C. 309(b)) to insert a provision that the Commission, in considering an application for a contract-carrier permit, shall consider "the effect which granting the permit would have upon the services of protesting carriers . . . ."

The language and legislative history of this amendment establish beyond any doubt that Congress intends the Commission to consider the adequacy of the service offered by common carriers in determining whether a service proposed by an applicant for a contract carrier permit is consistent with the public interest. In fact, the bill, as first offered, would have defined a contract carrier, in part, as one who proposes service "not provided by common carriers." Senate Report No. 703, July 24, 1957. This provision was not in-

cluded in the amendment, as enacted, because of the belief of Congress that it was not necessary in view of the requirement of a specialized service. *Id.*

As a result of this legislative action, even if this Court should conclude that the Commission has misconstrued its authority under the Act, as originally enacted, and should reverse, the Commission, upon remand, would be bound to follow the edict of the new law and consider the services offered by protesting common carriers in disposing of appellant's application. This issue, therefore, has been rendered moot, not only as to appellant, but to the motor-carrier industry generally.

The second issue raised by appellant is whether the proposed charter service qualifies for the exemption from economic regulation contained in Section 203(b)(9) (49 U.S.C. 303(b)(9)) relating to casual or occasional transportation by a person not engaged in transportation as a regular course of business or occupation.

Appellant is presently engaged in the business of transporting school children to and from schools in Campbell County, Virginia, and this is his sole means of livelihood. He proposes to transport various groups in charter service from all points in Virginia to all points in the United States, and return, and will hold himself out to provide this service as regularly and as frequently as required by the demands of interested groups.

Section 203(b)(9) (49 U.S.C. 303 (b)(9)) provides that the permit requirements of the Act shall not apply to:

> "the casual, occasional or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business . . . ."

To qualify for this exemption, the proposed service must not only be casual or occasional, but also must not be provided

by a person engaged in transportation as a regular course of business or occupation.

The words "casual" and "occasional" are not defined by the Act and, therefore, under general rules of statutory construction, each must be given the meaning it would have in ordinary usage. *Crane* v. *Commissioner of Internal Revenue*, 331 U.S. 1 (1946); *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607 (1943); *Martin* v. *United States*, 100 F 2d 490, 494, (1939). In ordinary usage, "casual" and "occasional" have been construed consistently to infer an element of chance, haphazardness, or lack of design. *Texas & N.O.R. Co.* v. *Owens*, 54 S.W. 2d 848, 853 (Tex. 1932); *Root* v. *Topeka Ry.*, 96 Kan. 694, 153 Pac. 550 (1915); Black's Law Dictionary, p. 274 (4th ed. 1951); Webster's New Collegiate Dictionary (2d ed. 1951), none of which is characteristic of the service planned by appellant. On the contrary, appellant proposes to provide interstate charter bus service as frequently and as regularly as the need and demand of the public may require.

While not expressed, apparently the only basis appellant has for his contention that the proposed service is "casual" or "occasional" is that it will not be operated on any fixed schedule or predetermined frequency, but will be on call or demand. If this basis is sufficient to render the charter service casual or occasional, then the Commission has been in error from the beginning of motor carrier regulation in taking jurisdiction over applications for certificates authorizing special or charter bus operations, as *all* such service is provided only upon call or demand. It is obvious that Congress did not intend this result since they provide, in Section 207 of the Act (49 U.S.C. 307), for the issuance by the Commission of certificates for special or charter bus operations.

Even assuming, however, that the proposed interstate operations of appellant are casual or occasional, nevertheless the exemption of 203(b)(9) is inapplicable because appellant is a

person engaged in transportation as a regular course of business or occupation.

In regard to this provision of the exemption, appellant contends that the phrase "transportation as a regular course of business or occupation" refers only to interstate transportation, and that, as a result, his intrastate operations do not disqualify him for the exemption. There is, however, no basis whatsoever for this contention, and, indeed, none is advanced by appellant. "Transportation," unlike many other words, is not defined in the Interstate Commerce Act. Section 203(a)(19) (49 U.S.C. 303(a)(19)), which refers to transportation, is not definitive and purports only to include activities not normally considered a part of transportation. The legislative history of this section of the Act, however, indicates that this exemption was intended to apply only to the operations of farmers and others who occasionally haul for hire, but who do not enter in any important way into the competitive picture of the motor carrier industry. 79 Cong. Rec. 5651. Furthermore, the Commission, without a single exception during the course of 20 years, has held that the term "transportation as a regular course of business or occupation" includes intrastate as well as interstate operations. I.C.C. Administrative Ruling No. 49, April 15, 1937; *Motor Carrier Regulations-Exemptions*, 10 M.C.C. 533 (1938); *Aaron W. Johnson, Common Carrier Application*, 54 M.C.C. 822, (1952); *Webster Common Carrier Application*, 72 M.C.C. 708 (1957). This consistent administrative interpretation is entitled to great weight before this Court and should not be overturned except for cogent reasons. *U. S.* v. *Chicago, N.S.&M.R. Co.*, 288 U.S. 1 (1932).

The issue of exemption, timidly raised by appellant, is not only unsubstantial, but, in view of the reasonable interpretation of the Commission over a long period of time, is actually frivolous.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. Accordingly, the judgement of the District Court should be affirmed.

Respectfully submitted,

LINWOOD C. MAJOR, JR.
JAMES F. NEAL
AND
WILLIAM C. BATTLE
Attorneys for Motor Carrier Appelles

Dated December 19, 1958

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of December, 1958, served a copy of the foregoing Motion to Affirm upon the counsel of record as listed below by first class U. S. Mail, with postage prepaid and addressed as follows:

WILBERT G. BURNETT, ESQ.
302 7th Street
P. O. Box 859
Lynchburg, Virginia

THE SOLICITOR GENERAL
Department of Justice
Washington 25, D. C.

HON. VICTOR R. HANSEN
Assistant Attorney General
Department of Justice
Washington 25, D. C.

HON. JOHN STRICKLER
United States Attorney
Western District of Virginia
Roanoke, Virginia

JAMES E. KILDAY, ESQ.
Department of Justice
Washington 25, D. C.

E. RIGGS MCCONNELL, ESQ.
Department of Justice
Washington 25, D. C.

ROBERT W. GINNANE, ESQ
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

CARROLL T. PRINCE, JR., ESQ.
Interstate Commerce Commission
Washington 25, D. C.

LINWOOD C. MAJOR, JR.
Attorney for Motor Carrier Appellees